

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)

Implementation of Section 309(j))

of the Communications Act)

– Competitive Bidding for Commercial)

Broadcasting and Instructional Television Fixed)

Service Licenses)

Reexamination of the Policy)

Statement on Comparative Broadcast Hearings)

Proposals to Reform the Commission's)

Comparative Hearing Process to)

Expedite the Resolution of Cases)

MM Docket No. 97-234

GC Docket No. 92-52

GEN Docket No. 90-264

REPLY COMMENTS

Network for Instructional TV, Inc., Sonoma County Board of Education, Santa Rosa Jr. College, Santa Rosa City Schools, and Association for Continuing Education (collectively, "ITFS Coalition") hereby submit the following Reply Comments in MM Docket No. 97-234.

The ITFS Coalition is a group of Instructional Television Fixed Service ("ITFS") licensees and applicants who have filed applications in reliance on the Federal Communications Commission's ("FCC") comparative point selection procedure for determining how to select between mutually exclusive ITFS applicants. Some of these applications have been pending since 1995. Should the Commission elect to resolve those applications by auction, it would completely undermine the years of effort and planning by these applicants to bring advanced distance learning services to students.

I. The Budget Act of 1997 Does Not Compel The FCC to Employ Auctions

The National ITFS Association ("NIA"), Wireless Cable Association International ("WCAI"), the ITFS Parties, BellSouth Corporation ("BellSouth"), Association of America's Public

Television Stations ("APTS"), and Schwartz Woods & Miller on behalf of various educators ("SW&M") and others convincingly demonstrated that Congress did not intend to auction ITFS licenses. The ITFS Coalition wholeheartedly agrees.

Under former Section 309(j) of the Communications Act of 1934 (the "Act"), all non-subscription services, including ITFS, were exempt from spectrum auctions. The Balanced Budget Act of 1997 (the "1997 Budget Act") amended Section 309(j) to require the use of auctions to resolve "mutually exclusive applications...accepted for any initial license or construction permit" not subject to specific exemptions listed in the statute.¹

Section 309(j) as amended exempted from competitive bidding "noncommercial educational broadcast stations" and "public broadcast stations" defined as "television or radio broadcast station[s]" which are: (1) eligible for FCC licensing as noncommercial broadcast stations and "owned and operated by a public agency or nonprofit foundation, corporation or association" or (2) owned and operated by a municipality and which transmit only noncommercial programs for educational purposes.²

Numerous commenters demonstrated how interpreting the Act to require ITFS auctions would be inconsistent with the FCC's historical treatment of ITFS.³ BellSouth notes how the FCC exempted ITFS from regulatory fees in the absence of a clear Congressional mandate on the basis

¹ 47 U.S.C. § 309(j) (emphasis added).

² 47 U.S.C. § 397(6).

³ The House Conference Report limits auctions to mutually exclusive applications for radio or television broadcast licenses received after June 30, 1997. House Conference Rep. No. 105-217, 105th Cong., 1st Session 573 (1997). To the extent the Commission determines it must conduct auctions for ITFS, it should not do so for pending modification applications at all and only for new station applications filed after June 30, 1997.

of the "general educational noncommercial status of the service."⁴ SW&M points out that like noncommercial educational stations, ITFS stations are exempt from filing fees.⁵

As WCAI so aptly states, "... for the Commission to find that Congress considered ITFS to be a broadcast service for purposes of competitive bidding would not be a stretch, since the Commission itself has on occasion referred to ITFS as a broadcast service."⁶ Indeed, the Commission itself referred to ITFS as a non-pay, non-commercial "broadcast" service in its October 10, 1997 Notice of Proposed Rulemaking in MM Docket No. 97-217.

Contrary to the contention of Hispanic Information & Telecommunications Network ("HITN"), the sole commenter who favors ITFS auctions, it is evident that Congressional intent was not clear.⁷ As Indiana Higher Education Telecommunications System ("IHETS") and the School District of Palm Beach County submit, courts have recognized that exceptions may be found in statutory provisions where such an interpretation is reasonable and necessary...to avoid absurd and manifestly unjust consequences.⁸ Given the essentially similar nature of the services provided by ITFS licenses and other non-commercial broadcasters (who enjoy a specific exemption from auctions) conducting auctions for ITFS but not non-commercial radio and television broadcasters would lead to an absurd result and defy common sense.

⁴BellSouth at 4.

⁵SW&M at 3, 4.

⁶WCAI at 7. WCAI cites the recent Commission determination that "the public interest would not be served if we were to exercise our permissible authority to require broadcasters, including ITFS licensees...to contribute to universal service".

⁷HITN at 4-6.

⁸IHETS at 6, Palm Beach at 5.

II. The Public Interest Dictates Against Conducting ITFS Auctions

The ITFS Parties and others point to the fact that the result of using competitive bidding to select between ITFS licensees is that local money earmarked for education will be diverted to FCC license acquisition.⁹ The ITFS Parties also point out that it is doubtful many public educational entities would be able to participate in an auction.¹⁰ The ITFS Coalition agrees. Given the difficulty of placing a value on ITFS licenses, it is doubtful that many educators would even know what to bid assuming they were prepared to do so. Thus the public interest would not be served by auctioning mutually exclusive ITFS applications.

CONCLUSION

In light of the educational nature of the ITFS service, Congress could not have intended to auction ITFS applications. Moreover, the public interest would not be served if the Commission were to conduct auctions between educators.

Respectfully submitted,

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⁹ITFS Parties at 5.

¹⁰ITFS Parties at 5.

CERTIFICATE OF SERVICE

I, Yvette King, hereby certify that the foregoing Reply Comments of ITFS Coalition was served this 17th day of February, 1998, by depositing a true copy thereof with the United States Postal Service, first-class postage prepaid, addressed to the following:

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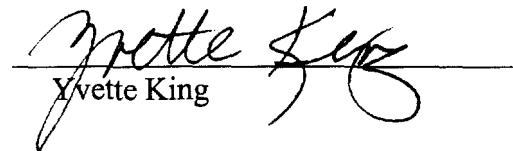
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